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December 28, 2011

Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Frank DiMattina, 11-Cr.-705 (JBW)

Dear Judge Weinstein:

On behalf of Mr. DiMattina, whose trial is scheduled to begin on January 3, 2012, we respectfully write once again to request the Court's assistance regarding our ongoing dispute with the government about the 3500 material.

After sending the Court and the government yesterday's letter regarding the government's failure to comply with the Court's Order of November 2, 2011, we received last night a discovery letter from the government purporting to disclose some of the requested 3500 materials. After having reviewed the disclosed material, it contains (1) a copy of the contract for sale of the catering business between John Doe and Mr. DiMattina and (2) police reports regarding incidents of vandalism and criminal mischief at John Doe's catering business on April 24, 2011 and April 28, 2011 by "unknown persons" and on May 6, 2011 by Ronnie Santori and "another unapprehended perp," each of which was made by NYPD officers other than individuals on the government's list of "possible witnesses."

It is the defense's position that the materials provided are not accurately described as 3500 material because they are not statements of any witnesses on the government's potential witness list and that, in any case, the materials are not sufficient to meet the government's obligations to provide summaries of all witnesses' testimony pursuant to the Court's Order of November 2, 2011.

The defense has now been informed by the AUSA that the rest of the 3500 material will be produced on a rolling basis starting Thursday or Friday. The defense respectfully submits that the government's actions are in breach of the Court's November 2, 2011 Order and are calculatedly impairing Mr. DiMattina's ability to prepare to confront the witnesses against him.

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The defense respectfully submits that these NYPD police reports must be excluded from the government's case in chief because none of them identify Mr. DiMattina by name and because, even if the government proffers that it will have John Doe testify as to the identity of the unknown person who committed the acts of criminal mischief on May 6, 2011, the police reports must be precluded pursuant to Federal Rule of Evidence 404(b) both for lack of timely disclosure and because they are insufficient to establish any admissible evidence in this case. Additionally, the police reports should be excluded as hearsay falling outside of any of the exceptions in the Federal Rules of Evidence.

As the Court is aware, the AUSA represented to the Court that he was prepared to give Mr. DiMattina a speedy trial at the parties' first appearance before Your Honor on October 27, 2011. The trial date of January 3, 2012 has been set since that time. The requested materials are critical to Mr. DiMattina's defense and the Court has directed their production. Therefore, we respectfully request that the Court again direct the government to produce the materials, especially the summaries of the witnesses' testimony, without further delay.

Finally, the government indicated in last night's submission that they will put us on notice of any 404(b) material of prior bad acts by Mr. DiMattina. At this time, we are respectfully requesting that the Court preclude evidence of any uncharged crimes or bad acts because the defense has not had reasonable notice and will not have any reasonable opportunity to argue, investigate, and prepare to defend on these acts if they are not disclosed before the holiday weekend before the start of trial.

If the Court would like to hold a pretrial conference on this matter, the defense is ready to appear at any time. Thank you in advance for your assistance in this matter.

Respectfully,

/s/
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Cc: AUSA Jack Dennehy (via ECF)